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Before the
Federal Communications Commission
Washington, DC

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-107
DAVID A. RINGER)	File No. BPH-911230MA
ASF BROADCASTING CORP.)	File No. BPH-911230MB
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
SHELLEE F. DAVIS)	File No. BPH-911231MA
OHIO RADIO ASSOCIATES)	File No. BPH-911231MC

For Construction Permit for an
FM Station on Channel 280A in
Westerville, OH

To: The Review Board

**CONSOLIDATED BRIEF IN SUPPORT OF INITIAL DECISION
AND CONTINGENT EXCEPTIONS OF SHELLEE F. DAVIS**

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December 20, 1993

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SUMMARY

These are the contingent exceptions and brief in support of Initial Decision being submitted by Shellee F. Davis. As seen herein, Shellee F. Davis is the clear preferred applicant in this proceeding. She has past connections and has evidenced a dedication and commitment to serving the community, and is an experienced businesswoman with a proven ability to establish and nurture a successful new business from the ground up. This, in and of itself, establishes a desirable basis for awarding the permit to Davis. Moreover, she will bring to the Columbus airwaves her unique background which has developed through her minority heritage, her long-term local and area residency, and her past civic involvement. Additionally, her technical proposal is unsurpassed in this proceeding, and significantly, not only will she restore the service previously provided by WBBY-FM to the area, by virtue of her enhanced, directional 6 kW engineering proposal, she will bring improved service to the area through her provision of new service to over 50% more persons than previously were served, which represents the most efficient use of the currently nascent frequency.

Should a remand of this proceeding, however, become necessary, as seen herein, issues must be added to explore ASF's, Ringer's, and Wilburn's financial qualifications, and the question of whether Ringer engaged in misrepresentations to the Commission. Moreover, the Initial Decision should be modified to increase the coverage due to Davis for her recent past civic involvement, to eliminate credits awarded to ASF and Ringer that were awarded for auxiliary power, and to eliminate comparative coverage credit awarded to ORA.

TABLE OF CONTENTS

I. BACKGROUND	1
II. QUESTIONS CONTINGENTLY PRESENTED FOR REVIEW	4
III. ARGUMENT	
A. The Presiding Judge Erred in Denying the Requests for Designation of Financial Issues Against Ringer, ASF, and Wilburn	4
B. The Presiding Judge Erred in Refusing to Designate a Misrepresentation Issue Against David A. Ringer	9
C. The Presiding Judge Improperly Excluded Information Contained in Davis' Hearing Exhibit Concerning Her Recent Local Civic Involvement	16
D. ORA Should Not Have Been Awarded Credit For Provide New Fourth Nighttime Service	17
E. Ringer and ASF Should Not Have Been Awarded Credit For Auxiliary Power	19
F. The Initial Decision Properly Awarded the Permit to Shellee F. Davis	19

TABLE OF AUTHORITIES

<u>Athens Broadcasting Co.</u> , 17 F.C.C.2d 452 (Rev. Bd. 1969)	19
<u>Barry Skidelsky</u> , 7 FCC Rcd 1 (Rev. Bd. 1991), <u>rev. denied</u> , 7 FCC Rcd 5577 (1992) . .	18
<u>Bradley, Hand and Triplett</u> , 89 F.C.C.2d 657 (Rev. Bd. 1982), <u>rev. denied</u> , 5 FCC Rcd 3712 (1990)	16
<u>David A. Ringer</u> , 8 FCC Rcd 2651 (Chief, Audio Services Div. 1993)	2
<u>Doylan Forney</u> , 2 FCC Rcd 6935 (ALJ Luton 1987)	18
<u>Eugene Walton</u> , 6 FCC Rcd 1288 (ALJ Gonzalez)	18
<u>Fine Music, Inc.</u> , 9 R.R.2d 1272 (Rev. Bd. 1967)	9
<u>Gloria Bell Byrd</u> , FCC 93-460 (Oct. 1, 1993)	23
<u>Houston Family TV, Ltd.</u> , 101 F.C.C.2d 676 (ALJ 1984), <u>aff'd</u> , 101 F.C.C.2d 661 (Rev. Bd. 1985)	17, 18
<u>Isis Broadcast Group</u> , 7 FCC Rcd 5125 (Rev. Bd. 1992)	9
<u>IAM Communications, Inc.</u> , 3 FCC Rcd 6285 (ALJ Stirmer 1988)	18
<u>Linda U. Kulisky</u> , 8 FCC Rcd 6235 (Rev. Bd. 1993)	19
<u>Maria M. Ochoa</u> , 8 FCC Rcd 3135	15
<u>Mark L. Wodlinger</u> , 58 R.R.2d 1006 (Rev. Bd. 1985)	17
<u>McClenahan Broadcasting, Inc.</u> , 5 FCC Rcd 7269 (Rev. Bd. 1990)	23
<u>Memorandum Opinion and Order</u> , FCC 93M-597 (Sept. 20, 1993)	3, 7, 9
<u>Memorandum Opinion and Order</u> , FCC 93M-602 (Sept. 22, 1993)	3, 6, 9
<u>Memorandum Opinion and Order</u> , FCC 93M-603 (Sept. 22, 1993)	3, 6
<u>Memorandum Opinion and Order</u> , FCC 93M-604 (Sept. 22, 1993)	3, 7, 9
<u>Memorandum Opinion and Order</u> , FCC 93M-605 (Sept. 22, 1993)	3, 7
<u>Memorandum Opinion and Order</u> , FCC 93M-610 (Sept. 23, 1993)	3, 7

<u>Memorandum Opinion and Order</u> , FCC 93M-639 (Oct. 7, 1993)	9
<u>Memorandum Opinion and Order</u> , FCC 93M-324 (June 3, 1993)	3
<u>Memorandum Opinion and Order</u> , FCC 93M-510 (Aug. 9, 1993)	3
<u>Memorandum Opinion and Order</u> , FCC 93M-639 (Oct. 9, 1993)	3
<u>Mid-Ohio Communications, Inc.</u> , 5 FCC Rcd 4596 (1990)	1
<u>Moore Broadcast Industries, Inc.</u> , 2 FCC Rcd 2754 (ALJ Frysiak 1987)	17
<u>Newton Television, Ltd.</u> , 3 FCC Rcd 553 (Rev. Bd. 1988)	23
<u>Order</u> , FCC 93M-642 (Oct. 8, 1993)	4
<u>Pleasant Hope Broadcasting, Inc.</u> , 6 FCC Rcd 1785 (ALJ Luton 1991)	17
<u>Policy Regarding Character Qualifications in Broadcast Licensing</u> , 102 F.C.C.2d 1179 (1986)	14
<u>Policy Statement on Comparative Broadcast Hearings</u> , 1 F.C.C.2d 393 (1965), <u>recon. denied</u> , 1 F.C.C.2d 918 (1965)	22
<u>Prehearing Order</u> , FCC 93M-186 (April 26, 1993)	3
<u>Proposals to Reform the Commission's Comparative Hearing Process</u> , 6 FCC Rcd 3402 (1991)	9
<u>Radio Jonesboro, Inc.</u> , 100 F.C.C.2d 941 (1985)	22
<u>Rayne Broadcasting Co.</u> , 4 FCC Rcd 6552 (ALJ Sippel 1989)	18
<u>Reexamination of the Policy Statement on Comparative Broadcast Hearings</u> , 7 FCC Rcd 2664 (1992)	24
<u>Revision of Application for Construction Permit for Construction Permit for Commercial Broadcast Station (FCC Form 301)</u> , 4 FCC Rcd 3853 (1989)	14
<u>Richardson Broadcasting Group</u> , 7 FCC Rcd 1583	15
<u>Ronald Sorenson</u> , 6 FCC Rcd 1952 (1991)	23
<u>Susan M. Bechtel v. Federal Communications Commission</u> , Case No. 92-1378 (D.C. Cir., Dec. 17, 1993)	24
<u>Terra Haute Broadcasting Corp.</u> , 17 F.C.C.2d 815 (1969)	9

<u>The Baltimore Radio Show</u> , 4 FCC Rcd 6437 (1989)	16
<u>Tuscon Community Broadcasting, Inc.</u> , 2 FCC Rcd 568 (Rev. Bd. 1987), <u>recon. denied</u> , 2 FCC Rcd 2860 (Rev. Bd. 1987)	19
<u>Waters Broadcasting Corp.</u> , 91 F.C.C.2d 1260 (1982), <u>aff'd, sub nom., West</u> <u>Virginia Broadcasting Co. v. FCC</u> , 735 F.2d 601 (D.C. Cir. 1984), <u>cert. denied</u> , 105 S. Ct. 1392 (1985)	23
<u>WFSP, Inc.</u> , 56 R.R.2d 1449 (Rev. Bd. 1984)	17, 18

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To: The Review Board

**CONSOLIDATED BRIEF IN SUPPORT OF INITIAL DECISION AND
CONTINGENT EXCEPTIONS OF SHELLEE F. DAVIS**

Shellee F. Davis ("Davis"), by her attorney, hereby submits her
 Contingent Exceptions with respect to the Initial Decision of Administrative Law
 Judge Walter C. Miller, FCC 93D-22, released on November 18, 1993, and other
 interlocutory rulings in this proceeding. With respect thereto, the following is stated:

I. BACKGROUND

1. This channel previously was occupied by Station WBBY(FM), whose
 license renewal application was denied by the Commission in Mid-Ohio
 Communications, Inc., 5 FCC Rcd 4596 (1990). By Public Notice, Report No. CF-
 22 (Nov. 25, 1991), a window period for filing applications for the allotment was
 established, which closed on December 30, 1991. Id. Applications initially were

filed for the allotment by nine applicants.¹ Report Nos. 15169 (Jan. 9, 1992) and 15172 (Jan. 13, 1992). All of the applications that had been filed were accepted as tendered for filing on February 6, 1992. Report No. 15189. The last day for filing amendments as a matter of right therefore was March 9, 1992. 47 C.F.R. § 73.3522(a)(6). The applications were accepted for filing on February 21, 1992. Report No. NA-156. The application filed by Nita and James Dean and John C. Landy were dismissed by Letter sent on behalf of Dennis Williams, Chief of the FM Branch on July 14, 1992. Public Notice, Report No. 21425 (July 21, 1992).

2. By Hearing Designation Order adopted on April 7, 1993, and released on April 15, 1993, this proceeding was designated for hearing. David A. Ringer, 8 FCC Rcd 2651 (Chief, Audio Services Div. 1993). The following issues were designated for hearing:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by WBC would constitute a hazard to air navigation.
2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

Id. at 2653 ¶ 16. By Order, FCC 93M-171 (April 21, 1993), the Chief

Administrative Law Judge appointed Walter C. Miller as the Presiding Judge in this

¹ David A. Ringer ("Ringer"), ASF Broadcasting Corporation ("ASF"), Wilburn Industries, Inc. ("Wilburn"), Juanita M. and James L. Dean, John C. Landy, Westerville Radio Partners, Shellee F. Davis ("Davis"), Westerville Broadcasting Company Limited Partnership ("WBC"), and Ohio Radio Associates, Inc. ("ORA"). The application of Westerville Radio Partners later was amended to specify Kyong Ja Matchak ("Matchak") as an applicant.

proceeding. By Memorandum Opinion and Order, FCC 93M-324 (June 3, 1993), the application filed by Kyong Ja Matchak (formerly Westerville Radio Partners) was dismissed for failure to prosecute. By Memorandum Opinion and Order, FCC 93M-510 (Aug. 9, 1993), the application filed by WBC also was dismissed.

3. The deadline for completing discovery was August 3, 1993. Prehearing Order, FCC 93M-186 (April 26, 1993). Pursuant to a joint deposition schedule, depositions were conducted during the week of July 12-16, 1993, and deposition transcripts were made available on August 6, 1993. Following the completion of discovery in this proceeding (and within 15 days of receiving transcripts of the depositions), Davis and ORA filed motions to enlarge the issues in this proceeding to specify, in part, financial issues against Ringer, ASF, and Wilburn. Those motions were denied by the ALJ. MO&O, FCC 93M-602 (Sept. 22, 1993); MO&O, FCC 93M-603 (Sept. 22, 1993); MO&O, FCC 93M-604 (Sept. 22, 1993); MO&O, FCC 93M-605 (Sept. 22, 1993); MO&O, FCC 93M-597 (Sept. 20, 1993); MO&O, FCC 93M-610 (Sept. 23, 1993). During the course of discovery and at the hearing, it also developed that the claims made by Ringer in his "Integration and Diversification Statement" filed in this proceeding on May 10, 1993 (as well as the identical claim made in his FCC Form 301) that he had "resided within the service area of [his] proposed station his entire life" was, as the Presiding Judge determined "totally false" (ID Finding ¶ 29) insofar as Ringer was gradually forced to concede that every one of his past residences, in fact, were outside the proposed 1 mV/m contour of his proposed station. Nevertheless, the misrepresentation issue requested by ORA on this matter also was denied. MO&O, FCC 93M-639 (Oct. 9, 1993).

4. A pre-hearing conference was held in this proceeding on August 16, 1993 (TR 1-27). The Admissions Session was held in this proceeding on August 20, 1993 (TR 28-129). The hearing in this proceeding was held on August 31, 1993 (TR 134-449). The record was closed on October 6, 1993. Order, FCC 93M-642 (Oct. 8, 1993). There are five applicants remaining in this proceeding.

II. QUESTIONS CONTINGENTLY PRESENTED FOR REVIEW

1. Whether the Presiding Judge Erred in Denying the Request for Specification of a Financial Issue Against David A. Ringer?
2. Whether the Presiding Judge Erred in Denying the Request for a Financial Issue Against Wilburn Industries, Inc.?
3. Whether the Presiding Judge Erred in Denying the Request for a Financial Issue Against ASF Broadcasting Corporation?
4. Whether the Presiding Judge Erred in Denying the Request for a Misrepresentation Issue Against David A. Ringer?
5. Whether the Presiding Judge Erred in Striking Shellee F. Davis' Claims to Credit for Civic Activities Engaged In After the Last Date for Amendment as Right in this Proceeding?
6. Whether the Presiding Judge Erred in Awarding Ohio Radio Associates a Slight Enhancement for Comparative Coverage?
7. Whether the Presiding Judge Erred in Awarding ASF Broadcasting Corporation and David A. Ringer Credit for Auxiliary Power?

III. ARGUMENT

A. The Presiding Judge Erred in Denying the Requests for Designation of Financial Issues Against Ringer, ASF, and Wilburn

5. Financial issues should have been designated against Ringer, ASF and Wilburn. By way of background, ASF, Wilburn, and Ringer all are proposing to use a site owned by Mid-Ohio Communications, Inc., the former licensee of Station WBBY, which is the station which vacated the frequency at issue in this proceeding.

As a part of the arrangement, Mid-Ohio has agreed to lease the tower site (tower and building) located at State Route 37, Sunbury, Ohio; studio facilities located at 14 Dorchester Court, Westerville, Ohio; and has allowed access to certain equipment that it previously used in conjunction with its operations. ASF, Wilburn, and Ringer interpreted this arrangement to constitute essentially a turn-key operation whereby it would not be necessary for them to purchase any equipment to construct the station -- rather, they only would have to pay the \$6000 rental fee for the existing site and all equipment. This interpretation, however, was proven to be incorrect. The letter "guaranteed" only that Mid-Ohio would provide "some or perhaps all of the equipment" listed on an inventory of equipment provided by Mid-Ohio, and in fact, to confirm the accuracy of this interpretation of the December 1991 Mid-Ohio Letter, the author of the Mid-Ohio letter was contacted. Mid-Ohio's representative, Mr. Fry, confirmed that Mid-Ohio has no provided no assurances of necessarily leasing all of the equipment to any applicant. As Mr. Fry stated, while valid assurances have been provided by Mid-Ohio for lease of the Mid-Ohio tower, transmitter builder and studio, the same cannot be said for the tangible personal property owned by Mid-Ohio:

In regard to the personal property, Mid-Ohio provided no assurance concerning what itemized equipment in the inventory accompanying the correspondence would be available to the successful applicant.

Thus, while Davis made financial arrangements to secure funding sufficient to replace (if necessary), any or all of whatever equipment Mid-Ohio may choose not to provide to the operator of the proposed station, Ringer, ASF, and Wilburn have not.

Instead of including funds in any of their budgets sufficient to accommodate the possible unavailability of some or all of the equipment for the operation of the station, all three applicants wrongly proceeded under the false assumption that "all" equipment has been "committ[ed]" to a successful applicant in this proceeding, and consequently, no additional funds have been budgeted by them for the purchase or lease of equipment to ensure their ability to successfully construct and operate their proposed station. This, in and of itself, required the designation of financial issues against all three parties.

6. Moreover, there were additional discovered defects with respect to each of the applicants, insofar as their budgets failed even to include all of the equipment specified in their particular proposals. The former Mid-Ohio station has at no time proposed to provide either (1) a directional antenna; or (2) auxiliary power generating equipment. Ringer's budget nevertheless failed to include either of these items, and based upon equipment quotations obtained by Davis, Ringer's \$50,000 fund for "Miscellaneous Expenses" was inadequate to accommodate these items. Thus, there is no question that Ringer omitted "decisionally significant" financial items from its budget, and the Presiding Judge's conclusions to the contrary (MO&O, FCC 93M-603, ¶ 9 (Sept. 22, 1993); MO&O, FCC 93M-602, ¶ 10 (Sept. 22, 1993)) were clearly erroneous.

7. In the case of ASF, ASF also failed to include provisions for those two items in its budget, and to this day has not amended its application to specify an adequate estimate of costs to include those items. Additionally, ASF's application contains false, inaccurate information concerning the amount of funds available to

ASF for the construction of its station. Although ASF's application states that it has \$208,000 in available funds (\$12,000 from Ardeth Frizzell and \$196,000 from non-voting stockholder Thomas J. Beauvais), ASF's corporate by-Laws specifically provide ASF with funds only in the amount of \$100,000 for the construction and initial operation of her proposed station -- use of the other dedicated funds are restricted (until after the filing of Davis' Motion) to pre-grant, prosecution costs. The Presiding Judge's analyses to the contrary (MO&O, FCC 93M-604, ¶ 9 (Sept. 22, 1993); MO&O, FCC 93M-605, ¶ 8 (September 22, 1993)) were erroneous. Therefore, when including estimates for the omitted auxiliary power and directional antenna equipment, it is evident that ASF's stated budget of \$90,000 was inadequate, and she also did not have adequate committed funds for the construction of its station.

8. Finally, in the case of Wilburn, in addition to failing to budget sufficient funds to account for the possibility that all of the Mid-Ohio equipment would not be made available to it, Wilburn failed to properly and timely prepare a written budget until apparently May 1993 -- over one year after it filed its application; its principals failed to review each others' balance sheets; and the net liquid assets available to Bernard Wilburn are inadequate to satisfy his financial commitment. Thus, the Presiding Judge's conclusion that no financial issue was warranted, despite the fact that "because of inexperience the Wilburns failed to perform some of the rituals that we experienced communications people expect to be performed" (MO&O, FCC 93M-610 n.3 (Sept. 23, 1993); MO&O, FCC 93M-597 n.4 (Sept. 20, 1993)) was also contrary to Commission precedent.

9. Pursuant to the requirements contained in the version of the FCC Form

301 adopted in 1989, an applicant:

must estimate the initial costs of constructing and operating the facility proposed in the application. The estimate for constructing the facility should include, but is not limited to, costs incurred for items listed below. In calculating costs for the items below, determine the costs for the items in place and ready for service, including amounts for labor, supervision, materials, supplies, and freight:

Antenna System...

RF Generating Equipment...

Monitoring and Test Equipment...

Program Origination Equipment...

Acquiring Land...

Acquiring, Remodeling or Constructing Buildings...

Services (including legal, engineering, and installation costs); and

Other Miscellaneous Items...

FCC Form 301, Instructions for Section III -- Financial Qualifications, Section D.

Ringer, ASF, and Wilburn, failed totally to prepare valid estimates of the cost for an antenna system, RF Generating Equipment, Monitoring and Test Equipment, or Program Origination Equipment -- instead, they each erroneously proceeded forward with their applications under the false belief that they had a commitment from Mid-Ohio for the lease of their used equipment. The Commission has stated:

The test to be used regarding the nature of the showing required to reopen the question of the adequacy of the applicant's finances will be...limited to a showing of misrepresentation or gross omission of some decisionally significant item which would render the proposal decisionally defective.

10. Based upon this precedent, it appears that ASF, Ringer, and Wilburn each have indeed omitted "decisionally significant items" from their budgets, and consequently, were not financially qualified at the time they filed their applications.

Financial issue were warranted against all three, and the Presiding Judge's failure to designate such issues constituted error. Contrary to the Presiding Judge's conclusions to the contrary, the Motion all were timely, inasmuch as they were filed within 15 days of the date deposition transcripts became available.² The Judge's assessment of the applicants' "good faith" (MO&O, FCC 93M-597 ¶ 11 (Sept. 20, 1993); MO&O, FCC 93M-602 ¶ 12 (Sept. 22, 1993); MO&O, FCC 93M-604 ¶ 11 (Sept. 22, 1993)) also should not have prevented the designation of the issues.³

11. For these reasons, should a remand become necessary, financial issues should be designated against Ringer, ASF, and Wilburn.

**B. The Presiding Judge Erred in Refusing to Designate
a Misrepresentation Issue Against Ringer**

12. The Presiding Judge also erred in his determination that a misrepresentation issue was not warranted against David A. Ringer. Memorandum

² Under Commission precedent, although a motion is not filed within the literal "15 days" specified under Section 1.229(b) of the Rules, as long as a party acts with "due diligence" once a transcript becomes available, "good cause" exists for acceptance of a motion to enlarge issues. Fine Music, Inc., 9 R.R.2d 1272, 1275 (Rev. Bd. 1967). Accord, Terra Haute Broadcasting Corp., 17 F.C.C.2d 815, ¶ 2 (1969). See also, Proposals to Reform the Commission's Comparative Hearing Process, 6 FCC Rcd 3402, 3409 n.5 (1991) (additional time to be allowed for filing findings and conclusions if there is a delay in obtaining transcripts).

The parties all agreed to the deposition joint deposition schedule established in this proceeding, and no responding party objected to the timeliness of the Motions.

³ As the Review Board has observed:

Reasonable assurance is an objective standard. An applicant's subjective belief...is not sufficient to meet the standard... See generally Janice Fay Surber, 5 FCC Rcd at 6159 ¶ 59.

Isis Broadcast Group, 7 FCC Rcd 5125, 5130 n.17 (Rev. Bd. 1992).

Opinion and Order, FCC 93M-639 (Oct. 7, 1993). From its inception, Ringer has engaged in an overt attempt to receive credit for comparative enhancements he had no entitlement, and in so doing, engaged in a clear attempt to abuse the Commission's processes.

13. The Integration Statement contained in Ringer's initial application stated as follows:

Mr. Ringer is claiming integration credit for past local residency. Mr. Ringer has lived at the following addresses in the proposed service area:

November 1987 - Present	1000 Urlin Avenue, #1017 Columbus, Ohio 43212
1974-1978	1729 Marrose Lancaster, Ohio
1972-1974	600 E. Town Street Columbus, Ohio
1964-1972	305 E. High Street London, Ohio
1960-1964	280 Old Village Road Columbus, Ohio
1948-1960	90 Rome Hilliard Road Columbus, Ohio
1941-1948	3065 Parkside Drive Columbus, Ohio

Mr. Ringer has resided in the service area his entire life except from 1978 to 1986 when he resided at 326 Fairway, Chillicothe, Ohio and during his time at Miami University in Oxford, Ohio from June 1961 to June 1962.

Ringer FCC Form 301. Ringer made these statements despite the fact (1) he clearly knew he was applying for a Class A station; (2) he ostensibly reviewed his entire

application (including his coverage map) before executing his application; (3) that Lancaster, Ohio is approximately 30 miles from Westerville; and (4) London, Ohio is approximately 25 miles from Westerville. These claims were repeated in his "Integration and Diversification Statement" filed in this proceeding on May 10, 1993, after this case was designated for hearing.

14. Just prior to his deposition in this proceeding, Ringer's comparative case began to unravel. Questions began to be asked concerning the location of his past residences, at which time he was forced to concede (off the record) that certain of the residences in actuality were not within the 1 mV/m contour of the proposed station, which in turn resulted in his submission of an amendment dated July 16, 1993, stating:

On July 15, 1993 I met with counsel to prepare for my deposition in the Westerville proceeding. As part of this preparation, I reviewed a copy of the Joint Engineering Exhibit that was prepared on behalf of the applicants. Counsel asked me to review the map that was included with the Joint Engineering Exhibit and that depicted my station's proposed service area and to verify whether my past local residences were, in fact, located within the station's 1 mV/m service contour. At this point, I realized that some of the residences, that were listed in my original application and in the Integration Statement I exchanged in the Westerville proceeding, were not located within the 1.0 mV/m contour, as shown on the Joint Engineering Exhibit map.

"Petition for Leave to Amend" dated July 16, 1993. At that point, he submitted a revised Integration and Diversification Statement which stated:

Mr. Ringer's full-time integration should be enhanced by the following record of local residence within the proposed station's service area:

<u>Dates</u>	<u>Location</u>
4/92 - Present	417 West Sixth Avenue Columbus, Ohio 43201
11/86 - 4/92	1000 Urlin Avenue, #1017 Columbus, Ohio 43212
1972-1974	600 E. Town Street Columbus, Ohio

Id. He also claimed credit for his civic activities as a Volunteer for Salvation Army Christmas Drives and for the Toys for Tots Program, and as a fundraiser, organizer, and volunteer for Children's Hospital. Id.

15. During the hearing in this proceeding, Ringer reasserted these claims. The claims were contained in his written Hearing Exhibits, and further, upon cross examination, he was asked questions and gave responses as follows:

Q: Would you state for the record your current address?

A: 417 West 6th Avenue in Columbus, Ohio.

Q: Is this address within the one millivolt contour of your proposed Westerville station?

A: I believe it is.

JUDGE MILLER: On what do you base that belief? Have you ever seen, have you ever seen the engineering map??

WITNESS: Yes, sir. Yes, I have, and I looked -- During my deposition, I saw that map and at that time I was able to judge for sure that it was within the one millivolt.

* * *

Q: And you have a past residence at 1000 Urlin Avenue.

A: Yes, sir.

Q: In Columbus. Is that residence within the one millivolt contour?

A: Yes, it is. Yes

Q: And how did you determine that this residence is within the proposed contour?

A: The same as my current address, by the map, the line. I'm within the line.

TR 138, 139-40.

16. That latter representation was determined to be inaccurate and false. As reflected in Davis Exh. 5, both of Ringer's past residences are located outside of Ringer's proposed 1 mV/m contour. The distance to Ringer's 1 mV/m contour in the direction of Ringer's prior residence at 600 E. Town Street is 31.8 kilometers, but that residence was located 32.8 kilometers from Ringer's proposed transmitter site. Davis Exh. 5 at 1. Thus, the residence was located 1.0 kilometers outside Ringer's proposed 1 mV/m contour. The distance to Ringer's 1 mV/m contour in the direction of Ringer's prior residence at 1000 Urlin Avenue is 32.4 kilometers, but that residence was located 33.8 kilometers from Ringer's proposed transmitter site. Davis Exh. 5 at 1. Thus, the residence was located 1.4 kilometers outside Ringer's proposed 1 mV/m contour. Ringer's counsel has conceded that both residences were located outside the proposed 1 mV/m contour of Ringer's proposed station. TR 276-77.

17. As a result, Ringer's far-flung claim that he "has resided in the service area his entire life" except for two periods of time was reduced to merely a showing that he instead first moved to the service area of his proposed station after the last day for filing amendments as a matter of right for the allotment in this proceeding, for which he is entitled to no comparative credit. Ringer appropriately was awarded no

credit for past residence or civic experience. As the Presiding Judge stated:

Originally Ringer laid claim to substantial *local residence*. He represented that "except from 1978 to 1986 when he resided at...Chillicothe, Ohio and during his time at Miami University in Oxford, Ohio from June 1961 to June 1962..." he had "...resided in the service area of the proposed station his entire life..." See the Integration and Diversification Statement Ringer filed on May 10, 1993.

That representation soon started unraveling. After he was deposed Ringer substantially modified that claim. It was discovered that several of his past residences were not inside the service area of his proposed station. So Ringer amended his application. See FCC 93M-587 released September 15, 1993.

A little later, it developed that the rest of Ringer's residences were also outside his proposed service area. See Davis Ex. 5; Tr. 276-277, 278-281. Thus, Ringer's representation that he has "...resided in the service area of the proposed station his entire life" turned out to be totally false. Consequently he'll be given no credit for that criterion.

ID ¶¶ 27-29.

18. As the Commission has stated:

[T]he trait of "truthfulness" is one of the two elements of character necessary to operate a station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.

* * * *

We believe it necessary to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission's processes cannot be maintained without honest dealings with the Commission....

Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d

1179, 1210 (1986). As the Commission stated in Revision of Application for

Construction Permit for Construction Permit for Commercial Broadcast Station (FCC

Form 301), 4 FCC Rcd 3853 (1989):

We believe that requiring applicants to specify their integration proposals by the end of the amendment-as-of-right period will achieve significant public interest benefits. First, it will facilitate early settlement of competing applications in comparative cases involving only new applicants by permitting parties in such cases to identify the relative strengths and weaknesses in their integration proposals, including whether there are any contingencies. This in turn potentially reduces the number of applicants who participate in the hearing, thereby reducing the cost of the hearing on both the participants and the Commission.

Id. at 3860 ¶ 57. Ringer's actions in this proceeding were a blatant attempt to frustrate this objective by creating the appearance of comparative superiority (for the factor of past residency) where none existed. Many of his initial claims of local residency did not even constitute "close calls," and in fact were located many miles outside his proposed contour, as even a cursory inspection of Ringer's initial application could have and should have revealed. Moreover, in each case where a local residency claim was reluctantly withdrawn, Ringer departed from his residence claims only when forced, claiming to the end that he had determined "for sure" that his residences were inside the station's proposed service contour. TR 138. As a result of Ringer's cavalier, false representations, the parties were forced to expend considerable resources to establish through engineering testimony, the fallacy of his representations.

19. Ringer's assertions regarding this matter were uniformly reckless and false, and indicate a knowing attempt on the part of Ringer to lay claim to enhancement credit to that which he clearly did not deserve, and were as significant and misleading as those at issue in the recent cases of Maria M. Ochoa, 8 FCC Rcd 3135 (1993) and Richardson Broadcasting Group, 7 FCC Rcd 1583 (1992). The

Presiding Judge's determination that a misrepresentation issue was not warranted was clearly in error, and should contingently be reversed.

III. The Presiding Judge Improperly Excluded Information Contained in Davis' Hearing Exhibit Concerning Her Recent Local Civic Involvement

20. Davis proffered the following written testimony in support of her claim to credit for past civic activities:

Some of her other involvement within the 1 mV/m contour is as follows:

- * * *
- o Columbus Government Workshop Panelist, 1992, in which she spoke to anyone interested in starting their own business or who has been in business for less than three years;
- o Ohio Department of Development's Women in Business Panelist, 1992, in which she spoke to the Columbus Chamber and other entrepreneurs about common problems experienced by female entrepreneurs;
- * * *
- o Judge for the Entrepreneur of the Year 1992 Awards, in which she aided in selecting 1992 awardees;

The Presiding Judge ruled that because these activities commenced after Davis' application was filed, the activities must be stricken. TR 73-74.

21. This ruling was in error. As the Review Board has stated, civic activities occurring after the filing of an application are entitled to credit, albeit of a lesser weight. The Baltimore Radio Show, 4 FCC Rcd 6437, 6441 ¶ 18 (1989); Bradley, Hand and Triplett, 89 F.C.C.2d 657, 663 ¶ 9 (Rev. Bd. 1982), rev. denied, 5 FCC Rcd 3712 (1990). Accordingly, the testimony of Davis' recent service to the Westerville area should have remained in the record, and should have enhanced her

quantitative integration credit to an even greater degree.

**IV. ORA Should Not Have Been Awarded Credit For
Providing New Fourth and Fifth Nighttime Service**

22. The Presiding Judge awarded ORA a "very slight" preference over Davis, ASF, and Ringer for service to underserved areas. ID Conclusion ¶ 9. This conclusion was in error. ORA will provide a new fourth nighttime aural service to 183 persons, and a new fifth nighttime service to 2,251 persons. This only is 0.03% and 0.37% ORA's total population, respectively. At best, when a decisionally significant number of persons will receive new fourth or fifth aural service, a very slight preference is awarded. WFSP, Inc., 56 R.R.2d 1449, 1450 (Rev. Bd. 1984) (very slight preference given for new 4th service to 576 people and new 5th service to 1,683 people); Houston Family TV, Ltd., 101 F.C.C.2d 676, 705 ¶ 107 (ALJ 1984) (very slight preference to new 4th and 5th service to 8,256 persons), aff'd, 101 F.C.C.2d 661, 674 ¶ 23 (Rev. Bd. 1985); Moore Broadcast Industries, Inc., 2 FCC Rcd 2754, 2767 ¶ 151 (ALJ Frysiak 1987) (new fifth service to 12,845 persons entitles applicant to very slight preference). However, when new service is provided to an insubstantial population, not even a slight preference is warranted.

23. Here, ORA's proposed new fourth and fifth service is itself de minimis, and should have entitled ORA to no independent comparative preference. Moreover, to the extent the new service is limited simply to nighttime service (when much of the "underserved" population it will serve is asleep), the service clearly should have resulted in no award of credit. Mark L. Wodlinger, 58 R.R.2d 1006, 1013-14 (Rev. Bd. 1985) (no preference given for provision of new fifth nighttime service to 1285

persons (out of total population of 72,313)); Pleasant Hope Broadcasting, Inc., 6 FCC Rcd 1785, 1792 (ALJ Luton 1991) (difference in nighttime service to underserved areas and populations of only 9727 persons deemed de minimis); Eugene Walton, 6 FCC Rcd 1288, 1303 ¶ 142 (ALJ Gonzalez) (new fifth nighttime service to 2010 more persons deemed too insignificant to merit awarding a comparative preference); Rayne Broadcasting Co., 4 FCC Rcd 6552, 6559 ¶ 57 (ALJ Sippel 1989) (new fifth service to 511 more persons is de minimis); IAM Communications, Inc., 3 FCC Rcd 6285, 6291 (ALJ Stirmer 1988) (new fifth service to 1803 more persons is considered de minimis); Doylan Forney, 2 FCC Rcd 6935, 6947 (ALJ Luton 1987) (new full-time fifth service to 1832 more persons is de minimis and deserves no preference).

24. Therefore, ORA's new fourth service to 183 persons and new fifth service to 2251 persons, at best, even if it had been full-time service and was substantial in nature, would have entitled it to a "very slight" preference under WFSP, Inc., 56 R.R.2d 1449, 1450 (Rev. Bd. 1984) (very slight preference given for new 4th service to 576 people and new 5th service to 1,683 people); Houston Family TV, Ltd., 101 F.C.C.2d 676, 705 ¶ 107 (ALJ 1984) (very slight preference to new 4th and 5th service to 8,256 persons), aff'd, 101 F.C.C.2d 661, 674 ¶ 23 (Rev. Bd. 1985). In light of the fact that ORA's proposed service will constitute only new nighttime service, ORA was entitled to no preference under this factor. Accord, Barry Skidelsky, 7 FCC Rcd 1, 11 n.15 (Rev. Bd. 1991) (new third nighttime service to 912 persons decisionally insignificant), rev. denied, 7 FCC Rcd 5577 (1992). Thus, the ALJ's decision to the contrary was in error.

**V. Ringer and ASF Should Not Have Been Awarded
Credit for Auxiliary Power**

25. ASF and Ringer each have pledged to install auxiliary power units capable of maintaining the station's operational power in the event of a commercial power failure. Id Finding ¶¶ 33, 42. Both applicants consequently would ordinarily be entitled to the award of a slight preference under this factor. Tuscon Community Broadcasting, Inc., 2 FCC Rcd 568, 569 (Rev. Bd. 1987), recon. denied, 2 FCC Rcd 2860 (Rev. Bd. 1987). However, neither applicant included auxiliary power generating equipment in their budgets prior to the time this proceeding was designated for hearing. TR 242, 145, 167. In the case of ASF, its principal, Ardeth Frizzell, did not become aware of the cost of auxiliary power generating equipment until after the depositions were conducted in this proceeding. TR 242.

26. The Presiding Judge nevertheless awarded Ringer and ASF auxiliary power preferences. Id Conclusion ¶ 17. This ruling was in error. As the Review Board recently noted in Linda U. Kulisky, 8 FCC Rcd 6235 (Rev. Bd. 1993), Commission precedent dictates that no credit for auxiliary power is warranted where auxiliary power generating equipment is not budgeted prior to designation of an application for hearing. Id. at 6238 n.1, citing, Athens Broadcasting Co., 17 F.C.C.2d 452, 461-62 (Rev. Bd. 1969). Therefore, ASF and Ringer were not entitled to credit for their deficient auxiliary power proposals, and the Presiding Judge's rulings to the contrary were in error.

**VI. The Initial Decision Properly Awarded the Permit
to Shellee F. Davis**

27. Shellee F. Davis was the clear preferred applicant in this proceeding and